IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1942, TERM

No._____

DUBUQUE FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

REYNOLDS COMPANY, INC., AND HOME INSURANCE COMPANY OF NEW YORK, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the court below, the United States Circuit Court of Appeals for the Fifth Circuit, has not been reported at the time of the preparation of this brief, but this opinion

is dated June 3, 1942, and is attached to this brief as an exhibit. It appears in the Record on pages 134, et seq.

STATEMENT OF THE CASE

This has already been stated in the preceding petition (on pages 2 to 5), which is here adopted and made a part of this brief.

SPECIFICATION OF ERROR

The District Court and the Circuit Court of Appeals erred in holding that the policy of excess insurance issued by Home Insurance Company of New York to Reynolds Company, Inc., was not another contract of insurance upon property covered in whole or in part by the policies of fire insurance issued by petitioner, Dubuque Fire & Marine Insurance Company, to Reynolds Company, Inc., upon its stock and fixtures in its Goose Creek, Texas, store, and that the issuance and existence of such policy did not bring about a forfeiture of the policies issued by petitioner, although each of petitioner's policies provided that it should be void if the insured then had, or should thereafter procure, any other contract of insurance upon the property covered, in whole or in part, by such policy.

ARGUMENT

Summary of Argument

POINT A

The respondent Reynolds Company, Inc., by securing from respondent Home Insurance Company of New York the excess policy of fire insurance involved in this case, increased the amount of insurance available to it in the event of a loss at its Goose Creek, Texas, store from the $7200.00 provided by the policies of the

petitioner to a total of $14,800.00. The holding of the Circuit Court of Appeals that respondent Reynolds Company, Inc., when it procured the Home Company's policy, did not make another contract of insurance upon property covered by petitioner's policies is erroneous and decides an important question of local law in a manner conflicting with the applicable local decisions. The highest court of Texas has repeatedly and uniformly held that the provision against other insurance in the Texas standard fire insurance policy is valid and should be enforced, because, in view of the moral hazard involved in overinsurance, insurers are entitled to the protection afforded by the right to control the amount of insurance carried upon property covered by them.

POINT B

The decision of the Circuit Court of Appeals that excess insurance, even though it increases the insurance available to the insured in the event of loss, is not another contract of insurance within the inhibition of a policy provision forbidding the insured to make another contract of insurance upon property covered by the policy, is such a decision as that there exist special and important reasons why this Court should exercise its discretion to review such decision. The decision of the Circuit Court of Appeals is wrong in principle, and abrogates a well-settled proposition of insurance law. Fire insurance underwriters and their insureds are adversely affected by such decision, and, therefore, important reasons exist for an authoritative decision on the question by the highest court of the land.

ARGUMENT

Point A

By holding that the Home policy was not another contract of insurance upon the property covered by petitioner's policies, the Circuit Court of Appeals has decided an important question of local law in conflict with the applicable local decisions.

The Home policy, found on pages 107-110 of the Record, insured Reynolds Company, Inc., against loss by fire (R. p. 107) to its Goose Creek, Texas, store (R. p. 108), including merchandise, furniture and fixtures (R. p. 108) for the sum of $7600.00.

The Dubuque policies, of which there were four (R. pp. 83-106), insured Reynolds Company, Inc., against loss by fire to the merchandise, furniture and fixtures in its Goose Creek store for the sum of $5,000.00 on the stock of merchandise and $2200.00 on the furniture and fixtures. These policies are identical except for the amounts and items covered. That they insure against the same risk, fire, as the Home policy is shown by pages 83, 89, 95 and 101 of the Record, and the amounts and items covered by pages 85, 91, 97 and 103 of the Record.

Each Dubuque policy recognizes the existence of the other Dubuque policies but prohibits any insurance other than that provided by the Dubuque policies and stipulates that the Dubuque policies shall be void "if the insured now has or shall hereafter procure any other contract of insurance, whether valid or not, upon property covered in whole or in part by this policy" (e.g., Record, p. 84, lines 21-23).

It is claimed that the Home policy is not another contract of insurance upon the property covered by the Dubuque policies because it provides that it does not become insurance against any hazard upon property which is insured by specific

insurance "until the liability of such specific insurance has been exhausted" (Record p. 108, Par. 9).

Clauses such as the one quoted from the Dubuque policies are common in fire insurance contracts. Their purpose is concisely stated by COUCH, CYCLOPEDIA OF INSURANCE LAW, Section 1041:

> "A condition ordinarily inserted in policies insuring property is one stipulating that the policy shall be void in case of other or double insurance upon the property covered by the policy, without the consent of the insurer. The objective of such a stipulation is to prevent the moral hazard from being increased without the knowledge of the insurer which has assumed the risk, it undoubtedly being true that even though the insured may retain an interest in the preservation of the property, the motive for its preservation would not be as strong if several policies existed upon the property aggregating a sum in excess of its actual value. Certainly, the insured might not be as watchful and careful of the acts of others as he would be if the property were not so fully protected. And not only is such a provision a protection against the gross carelessness of the insured in respect to his own acts and the acts of others, but it also tends to prevent any motive existing for the fraudulent destruction of the property by the insured."

The local law of Texas on the subject is exemplified by three decisions of the Texas Commission of Appeals, which is a commission of the Texas Supreme Court and whose judgments are adopted as those of the Supreme Court of Texas and whose decisions have the binding effect and dignity of those of that court. They are:

> BOATNER v. PROVIDENCE-WASHINGTON INSURANCE COMPANY (Tex. Com. App.), 241 S.W. 136.

In that case, Boatner, a merchant, held at the same time policies in the Providence-Washington aggregating $4,000.00

on his stock and fixtures and a policy with the Home Insurance Company covering $3,000.00 on his stock. The Providence-Washington policies allowed a total of $4250.00 insurance on the stock and fixtures and the Home policy allowed a total of $4000.00 on the stock. It will thus be seen that he had more insurance than that permitted by either of the two companies. Following a fire, payment was refused by both companies and litigation resulted.

The Texas Commission of Appeals, in refusing recovery to Boatner on either set of policies, specifically upheld the validity of the clause under consideration (which clause, by the way, read verbatim with the clause in the Dubuque policies in the case at bar), and had the following to say with reference to the clause:

> "The Providence-Washington Company in the policies it had issued to Boatner had fixed the limit of insurance it would permit on each and all items of the property. It had said he could not carry more than $8,250 on all the property. As a matter of fact, without permission from the company, and without its knowledge, he was carrying $11,250.00 on all the property. Had the Providence-Washington known of this, it might, and likely would, have cancelled all of its policies. It would have had a right to do so. The accumulation of all this additional insurance might reasonably have led the company to believe that it was the part of wisdom to cancel the contracts, as it had a right to do. This provision in the policies reserves to the company the privilege of keeping advised of additional or overinsurance if its policies are to remain binding. This is but a natural and reasonable right. We know of no warranty more material to the company than the one against additional or overinsurance. There is nothing so conducive to fraud as to permit overinsurance. This company inserted in its policy a clear, valid, material and reasonable provision in this respect. The contract was accepted by Boatner. It has been breached and its breach affected all the property insured. We cannot justify ourselves in depriving the

company of its rights under this contract voluntarily assumed by the parties themselves."

HOME INSURANCE COMPANY OF NEW YORK v. LAKE DALLAS GIN COMPANY (Tex. Com. App.), 93 S.W. (2d) 388.

In this case the same clause was upheld, with the following comment:

"Contractual provisions with respect to additional insurance are as important as the original promise to insure; and the requirement in the policy contract of consent to other insurance is held not to be arbitrary, but reasonable and proper, New Orleans Insurance Association v. Griffin, 66 Tex. 232, 18 S.W. 505. The provisions are strictly enforced."

BRITISH AMERICA ASSURANCE COMPANY v. MID-CONTINENT LIFE INSURANCE COMPANY (Tex. Com. App.), 37 S.W. (2d) 742.

This case involves the other insurance clause in the Texas standard fire policy. The opinion said in part:

"Each of the policies covering this property contained the standard concurrent insurance clause, which reads as follows: 'This entire policy, unless otherwise provided by an agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

"Under the settled law of this state the violation of the foregoing stipulation against other insurance rendered each of these policies void and barred any recovery thereon by the assured."

The three cases just cited have not been overruled or modified.

The well recognized purpose of the other insurance clause is to prevent the insured, without the consent of the insurer, from having available for the payment of his loss a greater fund than that provided by the policy containing the clause. It is not so much a question of overinsurance or double insurance, as the majority of the Circuit Court of Appeals seems to feel, or of the insured having the same property insured twice. It is rather a matter of the insurer knowing that the amount available in the event of a loss is limited, so that the incentive of the insured to protect the property will be greater.

In the case at bar, the Dubuque intended and contracted that the insured should know that if he sustained a loss, regardless of how much it might prove to be, $7200.00 would be all the insurance he could hope to collect. When the insured procured the Home policy, it, though excess insurance, nevertheless made available to the insured a fund of an additional $7600.00, or a total of $14,800.00, to pay any loss which it might sustain at its Goose Creek, Texas, store.

It needs little argument to demonstrate, therefore, that the holding of the Circuit Court of Appeals is entirely out of harmony with the spirit of the Texas decisions on the subject, and is in conflict with them.

The question is important. Insurance premiums are necessarily based upon the risk involved. The question in this case, directly or potentially, affects every fire insurance underwriter in the country and a substantial portion of those insured under standard fire insurance policies.

Point B

This Court should exercise its discretion to review the decision of the Circuit Court of Appeals, because of important and special reasons existing therefor, such reasons being:

(1) The decision of the Circuit Court of Appeals is out of harmony with and tends to upset that well established principle of insurance law which recognizes the right of an insurer, by contract, to control the total insurance carried upon any given risk upon which it may become bound;

(2) The present wellnigh universal use of fire insurance makes it necessary that the law affecting it be as free as possible from controversy, and, in the interest of certainty, this Court should pass on the question involved in the case at bar.

A reference to the two leading text books on the law of insurance (COUCH, CYCLOPEDIA OF INSURANCE LAW, Section 1041; COOLEY'S BRIEFS ON INSURANCE, pp. 2851, et seq.) will readily demonstrate that practically all American jurisdictions recognize, to quote COOLEY, that it is well established that "where a policy contains a clause providing that the policy shall be void if the insured has or shall procure any other insurance on the property, the procurement of additional insurance without the consent of the insurer voids the policy."

While we are aware that the holding of the Circuit Court of Appeals in this case is that the excess policy written by the Home Insurance Company was not additional insurance upon the property covered by the Dubuque policies, we submit that this holding does such violence to the language of the contract, and is so in disregard of the universally approved reason for including the prohibition against other insurance in the standard fire policy, that the decision strikes at the very root of this contractual provision of the fire policy and opens the door to its eventual emasculation by successive judicial decisions, each in turn taking something from the power of the provision.

Fire insurance affects a large part of the citizenry of the country. Both underwriters and insureds ought to know, as

far as humanly possible, what the customary fire insurance contract means, and the law should, therefore, be clear. While we know that this Court cannot undertake to make uniform the local law of the various states, and cannot even essay to make certain that the Circuit Courts of Appeals enter the same judgment that would have been entered by the state courts, nevertheless, it is without doubt the inherent power of this Court to review a decision of a Circuit Court of Appeals which is out of harmony with a well known principle of law generally prevailing in all of the states, and we submit that an authoritative decision on the point involved here from the United States Supreme Court would go far toward producing that certainty in the law and that uniformity of decision which is unquestionably desirable on a subject which, from its very nature, must necessarily be involved from time to time, not only in the Federal jurisdiction but also in all the state jurisdictions.

While it cannot be said that the question here under discussion is a matter of national interest, in the sense that it affects the entire population, it is a subject which potentially affects a substantial portion of the people because it bears upon a matter with which practically every property owner and every fire underwriter comes in contact sooner or later. We earnestly submit that this Court would be justified in granting a writ of certiorari solely because of the importance of the question involved.

Conclusion

We, therefore, submit that the writ of certiorari prayed for in the petition should issue.

HUGH Q. BUCK,
Counsel for Petitioner,
DUBUQUE FIRE & MARINE INSURANCE COMPANY

NEWTON GRESHAM,
Of Counsel

EXHIBIT A

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 9887

DUBUQUE FIRE & MARINE INSURANCE COMPANY,
Appellant,

VERSUS

REYNOLDS COMPANY, INC., ET AL., *Appellees*

Appeal From the District Court of the United States
for the Eastern District of Texas
(June 3, 1942.)

Before FOSTER, HUTCHESON, and MCCORD,
Circuit Judges.

MCCORD, Circuit Judge: Reynolds Company, Inc., a Texas corporation, owns and operates retail variety stores located in Texas and Louisiana. Between April 22 and November 26, 1939, Dubuque Fire & Marine Insurance Company issued four policies of fire insurance aggregating $7,200.00 and covering the merchandise and fixtures of the Reynolds store located at Goose Creek, Texas. Each policy was for a term of one year, and was written on the Texas standard form which contained a provision that the policy was to be void "if the insured now has or shall hereafter make any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." A special form attached to each policy con-

tained this further provision: "It is understood and agreed that no other fire insurance is permitted, unless the total amount allowed, including this policy, is entered in blank space in paragraph next above."

In September, 1939, Reynolds Company secured a blanket policy of fire insurance for all its stores from the Home Insurance Company of New York. Home Insurance Company was fully advised of the Dubuque coverage of the store in Goose Creek, and accordingly it was understood and agreed by the contracting parties that as to the Goose Creek store the Home policy would only operate as monthly reporting form "excess insurance" until after the expiration of the outstanding Dubuque policies. Applicable to the situation existing at the Goose Creek store, the Home policy provided that it would "not attach to or become insurance against any hazard upon property" until the specific insurance had become exhausted, and that it would then operate to "cover only such loss or damage as may exceed the amount due from such specific insurance." Dubuque was not advised of the issuance of the Home policy.

On January 6, 1940, the Goose Creek store was damaged by fire, and Reynolds Company sustained a loss of $4,483.00. At the time of the fire the value of the merchandise and fixtures at the store did not exceed $7,200.00, the aggregate amount of the Dubuque policies. Both the Dubuque and Home insurance companies refused to indemnify Reynolds Company for its loss, and suit was thereupon brought against them. After a trial without a jury, the court made findings of fact and conclusions of law, and entered judgment against Dubuque for the full amount of the loss and exonerated Home Insurance Company from liability.

It is without dispute that the Dubuque policies were for specific insurance on the merchandise and fixtures at the Goose Creek store; that the home policy was a floating policy for "excess insurance" at this location; and that before any

liability would accrue under the Home policy, the Dubuque policies of specific insurance, if valid and subsisting, would have to be exhausted. Decision of this appeal turns, therefore, upon the question of whether or not the *"excess insurance"* coverage for the Goose Creek store provided by the Home policy constituted *"other insurance"* within the inhibition of the forfeiture provision of the appellant's policies.

Clauses forbidding other concurrent insurance are not uncommon in fire insurance policies; and the validity of the *"other insurance"* provision of the Texas standard form policy is not questioned. Such provisions must be construed, interpreted, and applied according to their terms and obvious import. The well-known and evident purpose of such "other insurance" conditions in policies is to avoid and guard against the moral hazards and attendant temptations to fraud which might be reasonably expected to arise out of the existence of undisclosed concurrent policies of insurance having identity of scope and of subject matter. The thing sought to be prevented is double, concurrent, or overinsurance upon the same property, at the same time, and against the same risk—a situation in which a fire might be profitable to the insured. Couch Encyclopedia of Insurance Law, §1041; 24 Tex. Jur., p. 1011, §222; *Boatner v. Providence-Washington Ins. Co.*, 241 S.W. 136; *British-American Assurance Co. v. Mid-Continent Life Ins. Co.*, 37 S.W. (2d) 742.

The value of the fixtures and stock on hand at the Goose Creek store fluctuated from month to month. The Home policy was so written as to take care of periods, if any, when the value of the merchandise and fixtures exceeded the specific coverage of the Dubuque policies. It did not constitute concurrent "other insurance" upon the same property covered by the Dubuque policies, for it only took hold and commenced to cover where the Dubuque policies left off. In no event could Reynolds Company recover more than its actual loss, for the Home policy was in no sense double or concur-

rent insurance; it was merely floating or surplus insurance which was to operate as coverage only for the difference, if any, between the limit of Dubuque's specific insurance, and the limit of the actual value of the property at the Goose Creek store. At the time of the fire the value of the property and the extent of the loss was well within the aggregate coverage of the Dubuque policies. There was no surplus or excess value to be covered or taken care of, and the Home policy was, as one court has so aptly expressed it, in a condition of "innocuous inertia." *Wilson & Co. v. Hartford Fire Ins. Co.*, 254 S.W. 266, 283.

Within the meaning of the "other insurance" clause of appellant's policies there was no *double* or *other insurance* upon the property covered by its policies, and the Dubuque policies were not voided, but were in full force and effect as specific insurance at the time of the fire. Cf. *St. Paul Fire & Marine Ins. Co. v. Westmoreland*, 77 S.W. (2d) 265, 105 S.W. (2d) 203; *Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co.*, 252 N.W. 434; *Wilson & Co. v. Hartford Fire Ins. Co.*, 254 S.W. 266; *Continental Casualty Co. v. Curtis Publishing Co.*, 94 F. (2d) 710; *St. Paul F. & M. Ins. Co. v. Garza County Warehouse & M. Ass'n*, 93 F. (2d) 590; *Pearl Assurance Co. v. Hartford Fire Ins. Co.*, 195 So. 747.

The trial court correctly entered judgment for the full amount of the loss against Dubuque Fire & Marine Insurance Company.

The judgment is

AFFIRMED.

HUTCHESON, Circuit Judge, dissenting:

If I could accept the premises of the majority opinion, that the Dubuque policy prohibited not "other" but "other concurrent" insurance and that the Home policy did not take

hold of and cover the same property the Dubuque policies insured, I should of course accept its conclusion that the Home policy was not "other insurance" upon the property covered by the Dubuque policies. The first insuperable difficulty, as it seems to me in the way of acceptance of these premises and the conclusion drawn from them, is the fact that, contrary to the assumption of the majority opinion that the Home policy was not on the property covered by the Dubuque policies but on an excess value over and above their coverage, the Home policy does not read this way but on the contrary it expressly covers the same property the Dubuque policies insure.[1]

The excess clause of which so much is made does not I think at all prevent the policy from attaching to the property in question here. It merely in terms provides that it shall be additional insurance to any other insurance already on the property and as such additional insurance, the insurer will not look to it until the other insurance on that property is first exhausted, and the fact remains that the identical property is covered by the two policies together to the full extent of its value. This, the provisional amount[2] clause and the full reporting[3] clause of the Home policy makes very clear.

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[1] On the point material here the Home policy provides: "The Home Insurance Company, New York * * * does insure Reynolds Company, Inc., their legal representatives to the extent of the actual cash value of the property at the time of loss and damage * * * to an amount not exceeding as per limits on form * * * this policy insures Reynolds Company, Inc., (1) $37,125 on goods, wares and merchandise consisting principally of stock, to the property of the insured to include store, office and warehouse, furniture and fixtures, and etc. * * * (5) lists and locations and limits * * * Locations ..... 100% limits
Goose Creek, Texas
106 West Texas Avenue ... $7600

[2] "The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the total value of the property described herein subject to the limits of liability and provisions for other insurance herein provided."

[3] Liability under this policy shall not in any case exceed that pro-

The second is that the Dubuque policy clause invoked here[4] as releasing Dubuque from liability under its policy, does not as the majority opinion assumes, prohibit other "concurrent" insurance. It flatly prohibits "any other contract of insurance * * * on property covered in whole or in part by this policy" without regard to its kind.

In the face of this provision making definite prohibition against any other contract of insurance on the property and of the admitted fact that the Home policy, "though excess," is on the same property, the majority view that the Home Insurance on the very property covered by the Dubuque policies, the building, stock, furniture and fixtures, at No. 106 West Texas Avenue, Goose Creek, Texas, is not another contract of insurance, seems to me wholly untenable and I respectfully dissent.

A True copy:
Teste:

(SEAL)

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit

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portion of any loss hereunder, which the last reported value less the value insured by reported specific insurance, if any, at the location, where any loss occurs bears to the actual value less the value insured by specific insurance, if any, at that location at the time of such report."

[4] "Subject to Article 4890, Revised Statutes of Texas, this entire policy, unless otherwise provided by agreement endorsed or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."